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No. 96-844

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In The

Supreme Court of the United States

October Term, 1996

THE HONORABLE BRIAN BARNETT DUFF, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

v.

JIM EDGAR, GOVERNOR OF THE STATE OF ILLINOIS, ANN PATLA, DIRECTOR OF THE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES and K.L., L.F. & R.B., on behalf of themselves and all persons similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

STATE RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

(1) Whether the district judge's petition to review the Seventh Circuit's disqualification order has been mooted by his subsequent retirement and the reassignment of his cases, so that a reversal of the disqualification would have no effect.

(2) Whether the Seventh Circuit correctly disqualified Petitioner under 28 U.S.C. § 455 where the would-be trier of fact in a bench trial (a) conducted private screenings of expert testimony in his chambers, preapproved the expert witnesses' methodology and received and responded to *ex parte* submissions on settlement strategies and the merits, all in violation of Federal Rule of Evidence 706, Canon 3A(4) of the Code of Conduct for United States Judges and his own agreed order appointing expert witnesses; (b) barred discovery into the substance of his *ex parte* communications; and (c) threatened retaliation against the Governor of Illinois in this and other cases.

(3) Whether the Seventh Circuit acted within its discretion in refusing the district judge a second extension of time to respond to a petition for writ of mandamus, especially when the Court of Appeals' expedited briefing schedule was dictated by an emergency of the district judge's own making.

STATEMENT OF CORPORATE RELATIONS

Respondents Jim Edgar, Governor of the State of Illinois, and Ann Patla, Director of the Department of Mental Health and Developmental Disabilities, are not corporations and thus have no parent corporations or subsidiaries.

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STATE RESPONDENTS' BRIEF IN OPPOSITION

Respondents Jim Edgar, Governor of the State of Illinois, and Ann Patla, Director of the Department of Mental Health and Developmental Disabilities, respectfully request that this Court deny the petition for writ of certiorari filed by the Honorable Brian Barnett Duff on October 15, 1996, and docketed on December 2, 1996.

JURISDICTION

The petition for writ of certiorari is without jurisdiction because it has been mooted by Petitioner's retirement and the reassignment of his cases, so that a reversal of his disqualification would have no effect.

STATUTORY AND OTHER PROVISIONS INVOLVED

In addition to the provisions cited by Petitioner, this case also involves Sections 371 and 372 of the Judicial Code, Federal Rule of Evidence 706(a) and Canon 3A(4) of the Code of Conduct for United States Judges.

Section 371 of the Judicial Code, 28 U.S.C. § 371, recites in pertinent part:

> **§ 371. Retirement on salary; retirement in senior status**
>
> . . .
>
> (b)(1) Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and

meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements of subsection (f).

. . .

(c) The age and service requirements for retirement under this section are as follows:

Attained age:	Years of service:
65	15
66	14
67	13
68	12
69	11
70	10

. . .

(f)(1) In order to continue receiving the salary of the office under subsection (b), a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements set forth in at least one of the following subparagraphs:

. . .

(B) The justice or judge performed in the preceding calendar year substantial judicial duties not involving courtroom participation under subparagraph (A), including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is

> assigned. Any certification under this subparagraph shall include a statement describing in detail the nature and amount of work and certifying that the work done is equal to or greater than the work described in this subparagraph which an average judge in active service would perform in three months.

Section 372 of the Judicial Code, 28 U.S.C. § 372, recites in pertinent part:

> **§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline**
>
> (a) Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

Federal Rule of Evidence 706(a) states in pertinent part:

> **Rule 706. Court Appointed Experts**
>
> **(a) Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the

clerk, or at a conference in which the parties shall have opportunity to participate. . . .

Canon 3 of the Code of Conduct for United States Judges states in pertinent part:

> **A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY**
>
> The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:
>
> **A. Adjudicative Responsibilities.**
>
> . . .
>
> (4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

COUNTER-STATEMENT OF THE CASE

The United States Court of Appeals for the Seventh Circuit disqualified Petitioner based on extraordinary circumstances. Those extraordinary circum tances were established, not by representations of parties or their counsel, but by documents produced by a panel of court-appointed experts and by Petitioner's subsequent statements recorded in open court by his own court reporter. In addition to the one *ex parte*, off-the-record meeting with those witnesses acknowledged in the petition, those documents describe a series of such communications with the panelists—who were expected to testify at a bench trial before Petitioner—as well as *ex parte*, off-the-record communications with a plaintiffs' advocacy group and plaintiffs' counsel themselves. Those communications dealt with matters of substance, including the panelists' anticipated testimony at trial as well as strategies for using the press, public opinion and political leverage to pressure State officials into a settlement.

Respondents discovered these extraordinary facts on the eve of a scheduled trial because for the two previous years Petitioner prohibited any discovery into those *ex parte* communications. After partial disclosure was belatedly permitted, Petitioner forbade further inquiry, throwing a cloak of "judicial privilege" over his communications with the testifying experts. Petitioner displayed such extreme bias and prejudice toward Respondents that he threatened to retaliate against them in this and other cases. All these facts and more are noted in the Seventh Circuit's opinion. App. 29-42.

The Appointment of Rule 706 Experts

Because these Rule 706 witnesses were potential testifying witnesses and their testimony as "impartial" witnesses could be accorded great weight, a number of safeguards were built into the agreed order appointing them. First, the order was explicitly entered "pursuant to Rule 706 of the Federal Rules of Evidence." App. 48, 85. As the Court of Appeals observed, that rule ensures against *ex parte* communications between the district court and prospective witnesses.

> Rule 706(a) of the Federal Rules of Evidence specifies the right way [for a court to communicate with a Rule 706 witness]: "A witness so appointed [by the court] shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate." This places the substance of the instructions on the record and ensures that the parties know what is happening and can make appropriate suggestions, motions, and objections. The judge has not attempted to reconcile with Canon 3A(4) or Rule 706(a) the procedure he used in this case.

App. 33-34; *cf.* App. 87-88.[1]

Second, the panel was given a "manager," whose duties were stated in paragraph 3 of the order. Although

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[1] Canon 3A(4) enjoins a district judge "except as authorized by law, neither [to] initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding."

the petition quotes from paragraph 3, it misses the point made by the Seventh Circuit:

> Paragraph 3(a) permits the Manager to "report to the Court and the parties," not to report to the judge in secret, and it does not even hint that the experts (who were likely to become witnesses) may meet privately with the judge. Paragraph 3(b), on which plaintiffs lay principal stress, states that the judge may direct the experts, but again it does not say or imply that the judge may receive information and deliver instructions in secret.

App. 33, 51; *cf.* App. 87-88.

Third, the agreed order provided that "any and all information provided to the panel, its consultants or the Manager shall be available to the parties' counsel on request." App. 52, 87. In this way, all parties could discover all information on which these testifying experts might base their opinions.

Petitioner's Ex Parte Communications

Despite the mandate of Rule 706, the Code of Conduct for United States Judges and his own agreed order, Petitioner proceeded to have several *ex parte*, off-the-record communications with the expert witnesses and others. As the Seventh Circuit found, those communications were "calculated, material and wholly unnecessary." App. 35.

The petition focuses almost exclusively on one *ex parte* meeting—held in chambers between Judge Duff and the panelists on September 7, 1994. In concluding that

Petitioner pre-screened and pre-approved the expert witnesses' methodology in that meeting, the Seventh Circuit relied on evidence from two of the participants: an agenda prepared and produced by panelist Dr. Robert Okin that later served as the draft outline for the final report,[2] and Judge Duff's own remarks in open court on the purpose of that meeting. App. 32, 99-104. The agenda demonstrated that the meeting addressed a highly important issue in this case: the methodology of the panel's report, which was "open to challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 . . . . " App. 36. "After defendants filed their motion for disqualification, the judge justified his meetings with the panel precisely on the ground that the meetings would enable him to ensure that the panel's report was admissible—that is to say, the judge offered as justification for an *ex parte* meeting the need to anticipate and preempt an important legal question." App. 36; *cf.* App. 101-04.[3] While the petition quotes Petitioner's attempted justification in a footnote, it misses the significance of his admission. Pet. 27 n.9.

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[2] This agenda was not obtained by Respondents until immediately before the filing of the motion to recuse. App. 30. Respondents did not consent to this meeting; indeed, they were not even aware of it until *after* it occurred. App. 99-100.

[3] The petition offers a conclusory affidavit from the panel's manager regarding this meeting, but the affidavit does not deny that the methodology of the panel's approach was discussed. Nor does it say exactly what was discussed. Pet. 8-9. The affidavit is phrased to allow the manager to distinguish between the methodology of the panel's report and its "substance."

The petition also disregards Petitioner's many other *ex parte* communications. Among them were:

- **Two July 1995 letters exchanged between Judge Duff and an advocacy group and counsel for plaintiffs.** As the Seventh Circuit noted, the advocacy group's letter asked "the judge to release the panel's report to the public so that it could be used in lobbying efforts. [The group] sent a copy of this letter to plaintiff's counsel, but not to defendants' counsel. After consulting the Manager, the judge replied with a letter that reads, in part: 'in due time, we hope we will achieve some significant results.' A reasonable observer would hear this as an assertion—long in advance of trial—that the state's institutions and programs violate the Constitution, and that a remedial order is forthcoming." App. 37-38; *cf.* App. 118-22.[4]

- **A December 7, 1995 letter from Dr. Okin to Judge Duff.** As the Seventh Circuit recounted, the letter was intended to discuss the timing of the release of the panel's report so that the "fight" could be "won on the street, not just in court." It further described a strategy to bring the Illinois legislature around to settlement, saying "How loudly they gnash their teeth is irrelevant. Whether they pay is the only relevant issue." App. 40-41; *cf.* App. 108-17.[5]

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[4] While the petition mentions this exchange in a footnote, it completely disregards both its *ex parte* character and the import of the trier of fact's response. Pet. 9 n.1.

[5] The Court of Appeals found the panel to have been "influenced by secret submissions from advocacy groups and counsel supporting plaintiffs in other litigation against Illinois."

The Seventh Circuit drew these examples from a number of improper communications depicting a pro-plaintiff strategic alliance that ultimately included Petitioner, *see* App. 99-135, yet the petition largely ignores the record.

Petitioner's Cover-Up

Although the agreed order required any and all information provided to the panel to be produced to the parties "on request," Judge Duff blocked defendants' requests for two years. The petition for writ of mandamus listed the many oral and written requests defendants made for this information and the three separate motions they presented thereafter. App. 136-41. Not until two months before trial did Petitioner relent and allow some of the data and information to be released, although he continued to prohibit disclosure of his *ex parte* communications with the panelists, which, as the Court of Appeals found, he alternately described as "administrative" and "social." App. 30, 139-40.

On May 29 and June 12, 1996, Respondents obtained a partial production of documents from the manager and the panelists, which included the agenda for the meeting of September 7, 1994, and the letter from Dr. Okin of December 7, 1995. App. 92. Respondents immediately

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App. 40; *cf.* App. 127-35. The petition entirely disregards this subject as well. The replacement judge has since discharged the panel and barred them from testifying in the underlying case. App. 231-33, 241-42. While the petition protests the Seventh Circuit's ruling on the panel and the replacement judge's conduct on remand, this only demonstrates Petitioner's improper personal stake in the case. Pet. 14-15.

served subpoenas on the panelists and other persons, but Petitioner quashed those subpoenas. App. 143. He then released to Respondents, for the first time, copies of the July 1995 letters he had exchanged with the plaintiffs' advocacy group and had provided contemporaneously to plaintiffs' counsel, but he again prohibited any further inquiry into his *ex parte* communications with prospective trial witnesses on the stated ground of "judicial privilege." App. 30, 96-97, 141-42.

Petitioner's Threats of Retaliation

As the Seventh Circuit noted, Judge Duff began to demand "significant concessions in settlement negotiations" from defendants, including the personal appearance of the Governor of Illinois.[6] App. 38-39. In demanding the Governor's appearance, Petitioner made remarks that, according to the Court of Appeals, could reasonably be read "as veiled threats to decide not only this case, but also other pending cases, against the State of Illinois as a penalty for the Governor's unwillingness to appear." App. 39. Petitioner went so far as to comment that "defendants would be in 'deep doo' if the motion for disqualification failed." *Id.*

Mootness and Subsequent Proceedings

The Seventh Circuit disqualified Petitioner on July 18, 1996. App. 29. On October 10, 1996, five days before

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[6] Those demands were directly prompted by, among other things, Dr. Okin's December 7, 1995, secret communication with Judge Duff. App. 108-17.

he filed this petition, Petitioner exchanged letters with the Chief Judge of the United States District Court for the Northern District of Illinois. Petitioner's letter states "I wish to retire from regular active service with the District Court pursuant to the provisions of 28 U.S.C. § 372(a)." Res. App. 1.[7] Section 372(a) allows a district judge "who becomes permanently disabled from performing his duties [to] retire from regular active service . . . . " Res. App. 1. Petitioner's letter further requests that all his cases be reassigned to other judges—unless all parties to a case consent to leave it with him—and that no new cases be assigned to him. Res. App. 1. Petitioner expresses his hope that, in the future upon the Chief Judge's request, he would be able to perform the duties set forth in 28 U.S.C. § 371(f)(1)(B). Res. App. 1. That subsection describes "substantial judicial duties not involving courtroom participation . . . , including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued and administrative duties for the court . . . . "

That same day, the Chief Judge wrote back that he "shall enter the orders as you have requested." Res. App. 3. Also that same day, the Executive Committee of the United States District Court for the Northern District of Illinois entered two orders, one providing that no new cases be assigned to Petitioner and the other reassigning his current cases, with certain exceptions. Res. App. 4, 5. The exceptions to reassignment were (a) "where all of the parties agree that the case should be reassigned to Judge

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[7] Citations to the materials in the appendix attached to this response are abbreviated "Res. App."

Duff"; and (b) "any civil case in which trial has been conducted by Judge Duff and is under advisement awaiting a final opinion from the Judge" or any criminal case with a comparable status. Res. App. 4.

In the meantime, this case has proceeded before the replacement judge. On September 4, 1996, the replacement judge set a schedule for submission of a final pretrial order in the case on April 14, 1997. App. 247. On December 18, 1996, at plaintiffs' request, this schedule was modified so that the final pretrial order is now due July 2, 1997. Res. App. 6.

REASONS FOR DENYING WRIT

The petition does not present any conflict with Supreme Court precedent; it does not present any conflict among the Circuits; and it does not involve any questions of public importance. Indeed, the petition was mooted before its filing by Petitioner's voluntary retirement and the reassignment of his pending cases. The petition thus serves no interest other than the personal stake that a judge has improperly taken in a case over which he can no longer preside in any event.

I. PETITIONER'S RETIREMENT AND THE REASSIGNMENT OF HIS PENDING CASES HAVE RENDERED HIS PETITION MOOT.

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis,*

440 U.S. 625, 632 (1979). Indeed, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992).

When changed conditions have mooted an issue on mandamus, this Court has refused to address the issue. For example, in *Schlagenhauf v. Holder*, 379 U.S. 104, 108 n. 3 (1964), this Court held a denial of mandamus to be moot after the district court corrected the alleged error. Similarly, in *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969), after the denial of a writ of mandamus, this Court held an issue of election law to be moot because the election had already been held. And in *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982), this Court held moot a claim to pretrial bail once the defendant was convicted, stating, "The question was no longer live because even a favorable decision on it would not have entitled [the defendant] to bail."

Likewise, Petitioner's own actions rendered this petition moot before it was filed. Petitioner has retired from regular active service on the ground of permanent disability under section 372(a) of the Judicial Code. Under the terms of the Executive Committee orders, this civil case could not have been retained by Judge Duff because (a) all parties do not consent; and (b) it is not fully tried and awaiting decision. Respondents are aware of no request by the Chief Judge that Petitioner perform section 371(f)(1)(B) duties. Even if there were such a request, those duties do not include the kind of active courtroom participation needed to try this case. In any event, section 371(b)(1) requires that, before the Chief Judge makes such

a request, Petitioner meet certain age and service requirements, which he will not meet until 1999 when he will be 69 years of age. The current schedule ordered by the replacement judge will take this case to trial well before then.

The petition is moot and should be denied for that reason alone.

II. PETITIONER'S DISQUALIFICATION NEITHER CONFLICTS WITH ANY DECISION OF THIS COURT OR OTHER CIRCUITS NOR RAISES A QUESTION OF PUBLIC IMPORTANCE.

Even if the issues raised by the petition were not moot, certiorari should still be denied. Though Petitioner challenges his disqualification under each of sections 455(a) and 455(b)(1), neither challenge demonstrates any conflict between the Seventh Circuit's decision in this case and the decision of this Court or any Circuit; nor does Petitioner demonstrate the existence of an issue of public importance.

Petitioner's principal argument is that the Seventh Circuit's decision conflicts with the majority opinion in *Liteky v. United States*, 510 U.S. 540 (1994). According to Petitioner, *Liteky* requires a finding that "fair judgment was impossible" before any disqualification under 28 U.S.C. § 455(a). Pet. 22.

The Seventh Circuit's opinion conflicts not at all with *Liteky* but with Petitioner's misunderstanding of *Liteky*. In *Liteky*, the district judge received all his information about the case in open court in the course of adversarial

proceedings. 510 U.S. at 542-43, 550-51. Since the "opinions formed by the judge [were] on the basis of facts introduced or events occurring in the course of the current proceedings," the majority required disqualification to be premised on the display of "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555. But such a display is not required by *Liteky* when the district judge's remarks are "based upon extrajudicial knowledge or motives" or his disposition was "wrongful or inappropriate . . . because it rests upon knowledge that the subject ought not to possess . . . . " *Id.* at 545, 550.

The Seventh Circuit found this case to be the one anticipated by *Liteky* when the source of the trial judge's personal knowledge is "wrongful or inappropriate." In violation of Rule 706, the Code of Conduct for United States Judges and his own order appointing expert witnesses, Petitioner held *ex parte*, off-the-record communications with expert witnesses who were slated to testify on the merits of the case and then refused to allow inquiry into the contents of those communications. As the Seventh Circuit reasoned in following *Liteky*, "knowledge gained in a judicial capacity . . . enters the record and may be controverted or tested by the tools of the adversarial process. Knowledge received in other ways, which can neither be accurately stated nor fully tested, is 'extrajudicial.' " App. 34. No decision of this Court or any Circuit has found that a district judge can violate the rules of evidence and the judicial canons, privately communicate with testifying Rule 706 expert witnesses, refuse to disclose the contents of those communications

and then sit in judgment over those and other witnesses at trial. Such a procedure would smack of a show trial.

Nor is there any conflict between the Seventh Circuit's disqualification opinion and the decisions of other Circuits. For example, *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), a case cited by the Seventh Circuit but not even mentioned in the petition, the Third Circuit disqualified a judge who had "attended a predominantly pro-plaintiff conference on a key merits issue" and received a "Hollywood-style 'pre-screening' of the plaintiffs' case" from a collection of plaintiffs' experts. 977 F.2d at 782. After attending the conference, the district judge recognized that others might reasonably suspect his partiality and accordingly excluded the expert testimony of those who had participated in the conference. *Id.* at 783. But the court of appeals nonetheless disqualified him, stating that "we believe that a reasonable person might still suspect a prospective taint notwithstanding the district court's nonstatutory remedy." *Id.* That judge was disqualified even though he acted merely as a passive observer of expert testimony in a public forum; here, Petitioner took an active role in pre-approving expert witnesses' methodology during a private screening.

Petitioner's other main argument for certiorari is that the Seventh Circuit used a "new" definition of "personal knowledge" in disqualifying him under section 455(b)(1). Pet. 17. Not so. The Seventh Circuit's definition does not conflict with any decision of this Court. *Laird v. Tatum*, 409 U.S. 824 (1972), was decided before the 1974 amendments to section 455, and the issue in that case was whether a Supreme Court Justice had served as a "material witness" or had participated in the conduct of the

case, not whether he had "personal knowledge." Nor does the Seventh Circuit's definition conflict with that of any other Circuit. Neither *United States v. Evans*, 484 F.2d 1178 (2d Cir. 1973), nor *Schertz v. Waupaca County*, 875 F.2d 578 (7th Cir. 1989), defines "personal knowledge" under section 455(b)(1) or, indeed, even addresses the disqualification of a district judge.

At bottom, Petitioner's imagined conflict between the Seventh Circuit's opinion and either the decisions of other Circuits or the common practice of district courts is based entirely on his own confusion between testifying experts—such as in this case—and non-testifying experts or "technical advisers"—such as in the authorities cited in his petition. Pet. 17-20. When they deal with experts at all,[8] those authorities deal with non-testifying experts or technical advisers and with communications occurring after trial. *See United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 184 (2d Cir. 1991) (*ex parte* meetings with non-testifying housing advisor occurred post-judgment); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1231 (D.N.M. 1990) (*ex parte* phone conversations with non-testifying expert occurred after trial and were intended only to help the judge properly express opinions he had already reached).[9] The *Reference Manual on Scientific*

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[8] Two of his cases do not. *United States v. Phillips*, 664 F.2d 971, 1003 (5th Cir. 1981) (*ex parte* meetings with attorneys for one side); *Wolyn v. Livingston*, No. 93 Civ. 0618(TPG), 1995 WL 685971 (S.D.N.Y. Nov. 16, 1995) (*ex parte* conversations with court-appointed trustee).

[9] Further, in *Jackson*, the district judge did the opposite of what Judge Duff did; he offered to disclose all his notes and those of his clerks and allowed the adviser to be fully deposed on the communications. 757 F. Supp. at 1233, 1236-39.

Evidence, on which Petitioner also mistakenly relies, likewise pertains to technical advisors--not testifying experts. Pet. 19. The facts of this disqualification are so unusual that Petitioner cannot seriously liken his egregious conduct to the normal efforts of district courts "to foster settlement." Pet 20.[10]

III. PETITIONER'S PROCEDURAL ARGUMENT IS UNWORTHY OF REVIEW.

Petitioner's complaint that he was denied a "fair opportunity to be heard" by the Seventh Circuit, Pet. 25, cannot be squared with the facts and is not worthy of review. The Court of Appeals acted well within its discretion when it set a short response schedule on the petition for a writ of mandamus and when it ruled without oral argument and without receiving a brief from Judge Duff within the extended schedule. Not only was the Seventh Circuit's exercise of discretion warranted by the emergency created by Judge Duff, but the highly unusual circumstances in this case make it unlikely that this Court's review of that issue would provide any useful guidance to the Courts of Appeals for the future.

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[10] For example, local rules in the Northern District of Illinois provide that "[i]n a case where trial will be conducted without a jury, . . . the preferred method of having the court preside over settlement talks is for the assigned judge to arrange for another judge to preside or to refer the task to a magistrate judge." Rule 5.00 of the Local General Rules of the Northern District of Illinois (paragraph 5 of standing order establishing pre-trial procedure).

The petition for writ of mandamus was filed in the Seventh Circuit promptly on July 3, 1996, the same day Judge Duff released his decision denying defendants' motion for recusal. It was filed on the eve of trial because for two years Judge Duff had prevented defendants from obtaining the evidence that would confirm their suspicions. App. 30-31. On June 14, 1996, two days after being permitted to see but not copy evidence of the district judge's improprieties, defendants moved for immediate recusal or, in the alternative, for a stay and continuance of the trial, then set for July 15, 1996. App. at 92, 94. Judge Duff denied defendants' repeated requests for a continuance of trial with the disqualification motion pending, and he did not continue the trial until plaintiffs filed their own motion for continuance on July 2, 1996. App. 92, 98. Despite plaintiffs' request for a longer delay, the judge granted a continuance only until August 7, 1996. App. 92. Judge Duff otherwise rejected every request for a stay of proceedings, continued to rule on matters brought before him, including motions to compel, and expressed his intention to go to trial as scheduled. App. 92, 93-94, 98. It is truly ironic that the same judge now protests because the Seventh Circuit "could have allowed itself, the parties and the District Judge more time by granting Respondents' motion to stay the proceedings in the trial court," when he himself denied that motion more than once. Pet. 27.

Petitioner's citation to *In re Repetitive Stress Injury Litigation*, 35 F.3d 637 (2d Cir. 1994), is beside the point. In that case, the Second Circuit granted mandamus relief *sua sponte;* the district judge and the parties neither knew that

mandamus relief would be granted nor had any opportunity to oppose such relief. *Id.* at 639. In this case, in contrast, Petitioner not only had a "fair opportunity" to be heard but was actually heard on disqualification. After considering defendants' motion for recusal for three weeks, he issued a 23-page memorandum opinion. App. 1-23. "His position, stated at length . . . was fully considered by the panel." App. 41. In addition, the Seventh Circuit originally ordered "real-parties-in-interest" to respond by July 11. Pet. 11. It then extended the response date to July 15, allowing 12 calendar days in all for a response.[11] Pet. 11. The Court of Appeals noted "that the judicial respondent could have filed a response to the petition for mandamus on the same schedule as the private respondent, and did not do so." App. 41. Petitioner's claims of prejudice are unconvincing.

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[11] The petition before this Court complains that the mandamus petition and exhibits were left outside Judge Duff's office after business hours on July 3 and sat there for the weekend. Pet. at 11 n.2. But Petitioner neglects to mention that his clerk was notified of the filing during business hours and agreed to await delivery of the mandamus petition and all supporting papers, which was accomplished by 5:30 p.m., as agreed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOEL G. CHEFITZ,
Counsel of Record

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Counsel for Respondents Jim Edgar, Governor of the State of Illinois and Ann Patla, Director of the Department of Mental Health and Developmental Disabilities

December 31, 1996

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
Judge Brian Barnett Duff

Telephone
312-435-5541

October 10, 1996

Honorable Marvin E. Aspen
Chief United States District Judge
Room 2548

Dear Judge Aspen:

I have been informed by my physicians, whose certificates will be supplied, that I will be unable to perform my regular duties as a District Judge, including those set forth in 28 U.S.C. § 371(f)(1)(A). Accordingly, I wish to retire from regular active service with the District Court pursuant to the provisions of 28 U.S.C. § 372(a). Eventually, I hope to able, upon your request, to perform those duties set forth in 28 U.S.C. § 371(f)(1)(B).

During my period of disability, I request that I be relieved from assignment of any new civil or criminal cases, and that the current civil and criminal cases pending before me be reassigned, unless all parties in a particular case request the Chief Judge of the District Court that their case not be reassigned, and the Chief Judge, for such reason or otherwise, directs that such case or cases not be reassigned.

I stand prepared to complete such other formalities that are necessary to effectuate my request.

Sincerely,

/s/ Brian Barnett Duff

BBD:ss

(SEAL) UNITED STATES DISTRICT COURT
CHICAGO 60604

CHAMBERS OF
MARVIN E. ASPEN
CHIEF JUDGE

October 10, 1996

Honorable Brian Barnett Duff
United States District Judge
Room 2388

Dear Brian:

I received your letter with much regret and shall enter the orders as you have requested. You have served our Court with great diligence and dedication for which we are all grateful. Your warm friendship over the years has been especially appreciated. I wish you and your family well in the days to come and look forward to your continuing relationship with the Court.

Sincerely,

/s/ Marvin E. Aspen
Marvin E. Aspen

MEA:ss

United States District Court
Northern District of Illinois

ORDER OF THE EXECUTIVE COMMITTEE

IT IS HEREBY ORDERED That except as otherwise provided by this order all civil and criminal cases pending on the calendar of the Honorable Brian Barnett Duff be reassigned among the judges of this Court in proportion to their participation in the assignment of new cases. This order shall not apply to any civil case in which the trial has been conducted by Judge Duff and is under advisement awaiting a final opinion from the Judge. Nor shall it apply to any criminal case in which a defendant is currently awaiting sentencing by Judge Duff after the entry of a plea of guilty or after having been found guilty following trial.

IT IS FURTHER ORDERED That in any case reassigned pursuant to this order where all of the parties agree that the case should be reassigned to Judge Duff, a motion to reassign that case back to Judge Duff's calendar may be presented to the Chief Judge.

Enter:
For the Executive Committee

/s/ Marvin E. Aspen
Chief Judge

Dated at Chicago, Illinois, this 10th day of October 1996.

United States District Court
Northern District of Illinois

ORDER OF THE EXECUTIVE COMMITTEE

IT IS HEREBY ORDERED That no civil or criminal cases be assigned to the calendar of the Honorable Brian Barnett Duff. Whenever a card is turned bearing Judge Duff's name, it shall be passed and the next card turned. Whenever a case is filed that would be assigned directly to Judge Duff's calendar, it will be assigned by lot to the calendar of another judge.

IT IS FURTHER ORDERED That this order shall take effect on entry.

Enter:
For the Executive Committee

/s/ Marvin E. Aspen
Chief Judge

Dated at Chicago, Illinois, this 10th day of October 1996.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Joel Gerald Chefitz
Katten, Muchin & Zavis
525 West Monroe Street
Suite 1600
Chicago, Il 60661-3693

Case Number: 1:92-cv-05722

Title: K L v. Edgar

Assigned Judge: Honorable James H. Alesia

MINUTE ORDER of 12/18/96 by Hon. James H. Alesia: Granting motion for an extension of time to submit reports of their retained experts [284-1]. Plaintiffs are ordered to disclose expert witnesses in full compliance with FRCP 26 by 3/15/97. Defendants are ordered to disclose any expert witnesses in full compliance with FRCP 26 by 5/1/97. Discovery cut-off date is extended to 6/2/97, and date for submission of the final pretrial order in open court is reset to 9:30 a.m. on 7/2/97. Plaintiffs are ordered to submit their version of the final pretrial order to defendants by 6/18/97. These dates are final. Mailed notice

This docket entry was made by the Clerk on December 19, 1996

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated

by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.